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Philips Consumer Communications

A Lucent Technologies and Philips Electronics venture

Gerard G. Nelson
Government Affairs Director

June 29, 1998

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BY FEDERAL EXPRESS

Ms. Magalie Roman Salas

Secretary

Federal Communications Commission

1919 "M" Street N.W.

Washington, D. C. 20554

Dear Ms. Salas:

Enclosed are an original and ten copies of the Comments of Philips Consumer Communications LP in response to the *Commission's Notice of Proposed Rulemaking*, W. T. Docket No. 96-198, FCC 98-55 (released April 20, 1998), *Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment and Customer Premises Equipment*.

Also enclosed is a computer disk, with copies of the document in five different formats: Microsoft Word 6.0 for Windows, Rich Text Format, Text Only, WordPerfect 5.1 for DOS, and WordPerfect for Windows.

Kindly stamp one of the ten copies indicating that it has been received by the Commission and return it in the enclosed self addressed, stamped envelope.

Very truly yours,

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Before the
Federal Communications Commission
Washington, D. C.

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In the Matter of)
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Implementation of Section 255 of the)
Telecommunications Act of 1996)
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment)
By Persons with Disabilities)

WT Docket 96-198

COMMENTS OF
PHILIPS CONSUMER COMMUNICATIONS LP

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Executive Summary

In its Comments, Philips Consumer Communications LP ("PCC") argues that the Commission should dismiss Section 255 complaints upon a manufacturer's demonstration that one of the manufacturer's products provided the desired accessibility features, the lack of which in another one of the manufacturer's products prompted the complaint. Providing such a product clearly accomplishes the goal of Section 255, ensuring that accessible products are available to individuals with disabilities. In addition to considering the questions "Is the feature feasible?," "What would be the expense of providing the feature?," and "Given its expense, is the feature practical?" when evaluating whether an action to enhance accessibility is readily achievable, the Commission also should consider whether the action would involve delays in introducing new products into the marketplace and whether the action would involve an alteration of an essential or fundamental characteristic of the product. The Commission should not extend the obligations of Section 255 to providers of information services and manufacturers of related equipment because such an extension would be inconsistent with the plain language of Section 255 which limits such obligations to providers of telecommunications services and manufacturers of telecommunications equipment and CPE. The five day response period contemplated by the Commission's "fast track" complaint process is far too short to provide a meaningful opportunity to resolve complaints about the accessibility of products. Rather than implement its proposed fast track process, the Commission should refer consumers with a complaint about the accessibility of a product to the manufacturer and provide a period of sixty days for the manufacturer to resolve the consumer's

accessibility issue. A reasonable standing requirement for Section 255 complaints -- that the complaint be filed by or on behalf of an individual with a disability -- would facilitate the orderly resolution of Section 255 complaints; therefore, such a standing requirement should be adopted by the Commission. PCC proposes that the Commission require that any complaints lodged under Section 255 be filed by, or on behalf of, an individual with a disability. And, finally, the Commission should adopt measures to fully protect a manufacturer's confidential business information that is submitted in response to a Section 255 complaint by adopting procedural rules that provide a manufacturer with a presumption that material identified as "business confidential" information when it is submitted to the Commission will be treated as such.

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WT Docket 96-198

COMMENTS OF
PHILIPS CONSUMER COMMUNICATIONS LP

Pursuant to Section 1.415 of the Commission's Rules, Philips Consumer Communications LP ("PCC") respectfully submits the following Comments in response to the *Notice of Proposed Rulemaking*, FCC 98-55, released April 20, 1998 ("*NPRM*"), seeking comment on issues related to the implementation of Section 255 of the Telecommunications Act of 1996 ("1996 Act")¹ regarding the accessibility of telecommunications services, telecommunications equipment, and customer premises equipment to persons with disabilities. PCC is a joint venture of Lucent Technologies Inc., formerly AT&T Corp.'s systems and technology business, and Philips Electronics N.V. PCC manufactures a broad array of wireline and wireless customer premises equipment ("CPE") and is a major supplier of such equipment in the United States.

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

Lucent Technologies' Consumer Products operating unit, which Lucent contributed to the joint venture with Philips Electronics, participated in various proceedings before the Commission regarding the accessibility of customer premises equipment products for individuals with disabilities affecting hearing. In addition, the Lucent Consumer Products operating unit participated actively in the work of the Telecommunications Access Advisory Committee ("TAAC"), established by the Architectural and Transportation Barriers Compliance Board ("Access Board") for the purpose of making recommendations regarding accessibility guidelines for telecommunications equipment and customer premises equipment.²

As it affects manufacturers, Section 255(b) of the 1996 Act requires manufacturers of telecommunications and customer premises equipment to "ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable." If such accessibility is not readily achievable, manufacturers must ensure that the equipment is compatible with "existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable." The term "readily achievable" has the meaning given to it by Section 301(9) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. 12181(9). Section 255(e) further requires the Access Board, in conjunction with the Commission, to develop guidelines for equipment accessibility ("Accessibility Guidelines") within 18 months of enactment. Section 255(f) of the

² Notice, 61 Fed. Reg. 13813 (March 28, 1996). Specifically, the TAAC was charged with making recommendations on the following issues: (1) types of equipment to be covered by the guidelines; (2) barriers to the use of such equipment by persons with disabilities; (3) solutions to such barriers, if known, categorized by disability; and (4) the contents of the guidelines.

1996 Act vests with the Commission "exclusive jurisdiction" with respect to complaints under Section 255. PCC's Comments on the issues raised by the Commission in its *NPRM* follow.

In resolving complaints under Section 255, the Commission should dismiss any complaints upon a manufacturer's demonstration that another of the manufacturer's products provides the desired accessibility features.

The Commission's adjudication of complaints about the accessibility of a product should not subject a manufacturer to the expense of further processing of the complaint -- for example, by requiring the manufacturer to demonstrate that providing the desired accessibility feature was not readily achievable -- once the manufacturer has demonstrated that another of the manufacturer's products with substantially similar features, functions, and prices provides the accessibility feature that the complaint alleges is lacking and the manufacturer has made arrangements for the consumer to purchase a product that provides the required accessibility features.

Several factors make this approach appropriate. First, as the Commission recognized in its discussion of "feasibility," it is often not possible to design individual products that incorporate solutions to a wide variety of barriers. *NPRM*, para. 101. Second, as they compete in the hotly contested marketplace for CPE, manufacturers differentiate their products by offering numerous products with different combinations of product features -- many of which serve to enhance the accessibility of products to individuals with disabilities. For example,

speakerphones, often used by individuals with motor impairments, are offered as one of several features on many, but not all, wireline telephones. Third, consumers, including individuals with disabilities, have the ability to choose among various manufacturers' offerings in the competitive marketplace. And, fourth, the availability of a product of a given manufacturer with a specific accessibility feature at any given retail outlet is subject to product-carrying decisions by unaffiliated, independent retail operators who may, for example, choose to carry one product with a speakerphone from one manufacturer and another product without a speakerphone from another manufacturer.

Given these factors, and the fact that the goal of Section 255 is to meet the accessibility needs of individuals with disabilities, the ability of a manufacturer to provide to a consumer a product that provides both the desired accessibility and substantially comparable features and prices should end a complaint.

In resolving complaints under Section 255, the Commission should recognize that manufacturers are obligated to incorporate features enhancing the accessibility of their equipment only to the extent that it is "readily achievable" to do so.

Section 255(a) (2) incorporates by reference the term "readily achievable" from the ADA where it is defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). The Commission proposes adopting the statutory definition of the term "readily achievable" and analyzing whether an action is readily achievable by considering three questions: (1) Is the feature feasible? (2) What would be the expense of providing the feature? and (3) Given its expense, is the feature

practical? *NPRM*, at para. 100. In view of its origins, it is appropriate to look for guidance about the meaning of the term “readily achievable” in the context in which it is used in the ADA. There, the term “readily achievable” is used to describe the limits on the obligation of operators of public accommodations to remove architectural and communications barriers that are structural in nature. Barrier removal is limited to those circumstances where it can be accomplished “easily and without much difficulty or expense.” The term addresses “the degree of ease or difficulty that the business operator would experience in removing a barrier. . . .” House Committee on Energy and Commerce, H. Rep. No. 485, Part 4, 101st Cong., 2d Sess. (1990), at pp. 56-57 (“Commerce Report”). Examples of the types of actions that would be considered readily achievable include “the addition of grab bars, the simple ramping of a few steps, the lowering of telephones, the addition of raised letter and Braille markings on elevator control lights, and similar modest adjustments.” House Committee on Education and Labor, H. Rep. No. 485, Part 2, 101st Cong., 2d Sess. (1990), at p. 110. Thus, the ADA requires only that an operator of a public accommodation take relatively simple, inexpensive actions that would increase the accessibility of the public accommodation, even if the end result is something short of full accessibility. The DOJ regulations implementing the provisions of Title III of the ADA that require the removal of architectural barriers in existing facilities, where readily achievable, provide numerous examples of steps to remove barriers. 28 C.F.R. 36.304 (a) and (b). None of these examples are steps which would constitute more than a small fraction of the operating expenses of the public accommodation. Moreover, the DOJ, when it urges in its Regulations that operators of public accommodations follow its recommended priorities

for barrier removal, clearly recognizes that all barriers may not be removed at once.

28 C.F.R. 36.304(c).

Applying this definition and guidance regarding the term “readily achievable” from the ADA to manufacturers of telecommunications and customer premises equipment would require manufacturers to design, develop, and fabricate equipment incorporating analogous simple and inexpensive features that increase the usability of the equipment by individuals with disabilities. It would be inconsistent with the definition and application of this term to require manufacturers of telecommunications or customer premises equipment to incorporate accessibility features if doing so would add materially to the cost of designing, developing, and manufacturing a product. The use of highly contrasting colors for numbers or letters and their background, making buttons as large as practical in view of the size of the equipment, and making wireline handsets that can be used by individuals with hearing aids equipped with telecoils are all examples of accessibility features that clearly would be “readily achievable.” Other technically feasible features -- voice recognition, for example -- would not be required on simple, low cost products because the degree of difficulty or expense of providing them currently would exceed the “readily achievable” threshold.

In addition, the DOJ regulations implementing the ADA do not require operators of public accommodations to modify their policies, practices, or procedures where “the modification would fundamentally alter the nature of the [public accommodation’s] goods, services, facilities. . . .” 28 C.F.R. 36.302. Likewise, telecommunications and customer premises equipment manufacturers should not be required to add accessibility features if doing so would alter fundamentally the nature of the equipment. For example, a

manufacturer of a very small communications device intended to meet a market need for such small devices would not be required to incorporate accessibility features -- such as large control buttons or a large visual display on a wrist-watch sized paging device -- which would require enlarging the size of the device, thereby altering the fundamental characteristic of "smallness". Similarly, manufacturers ought not be required to incorporate accessibility features that would materially limit the mass market appeal -- and hence the volume of sales -- of a product in the general marketplace. Incorporating accessibility features that would so limit the appeal of a product would have the effect of changing a mass market product into an assistive device of limited application -- thus altering a fundamental characteristic of the product.

PCC believes that the Commission's three questions are an appropriate starting place for an analysis of whether, in a particular circumstance and with respect to a particular product, an action to enhance accessibility is readily achievable. However, PCC also believes that the Commission should explicitly recognize that, in addition to feasibility and expense, an action to enhance accessibility should be assessed by considering whether incorporating an accessibility feature would add time to the product development process, thus delaying the introduction of the product into the marketplace, whether it would involve altering a fundamental or essential characteristic of a product, or whether it would limit the usefulness of the product to its target market or its expected volume of sales. Requiring a manufacturer to take actions having these effects would clearly be inconsistent with the limitation on manufacturers' obligation to do that which is readily achievable -- that which is accomplished easily and without much difficulty or expense.

The Commission should implement Section 255 as clearly intended by Congress and apply it to telecommunications services, telecommunications equipment and customer premises equipment.

The Commission seeks comments on whether, given the “broad objectives” of Section 255, Congress might have intended Section 255 to apply to a “broader range of services” than telecommunications services and, by implication, a broader range of equipment as well. *NPRM*, para. 42. However the objectives the Congress sought to accomplish with Section 255 are described, the fact is that the Congress used several specific terms in Section 255 -- terms that are defined in the 1996 Act -- to establish the scope of service provider and manufacturer obligations under Section 255. Specifically, this Section applies to manufacturers of telecommunications equipment and customer premises equipment and to providers of telecommunications services. Each of these terms, which define the responsibilities of manufacturers and service providers to provide equipment and services that are accessible, are defined in the Act. In addition, the 1996 Act also defined the term “information service,” which was not included in the language of Section 255. 47 U.S.C.A. Section 153 (14), (20), (43), (45), and (46) and 47 U.S.C.A. 255. It would be inconsistent with the very plain language of the statute for the Commission to conclude that the Congress intended that a broader array of services be covered by the obligations of Section 255. If the Congress had intended that Section 255 apply to a broader array of services, it would have written Section 255 differently than it did.

The Commission should not adopt its proposed definition of the term "accessible to and usable by" and adopt, instead, a term that reflects the practical impossibility of a universally accessible product

Although Section 255 uses the term "accessible to and usable by," it does not provide or incorporate a specific definition. 47 U.S.C.A. Section 255. In its Accessibility Guidelines, the Access Board defined equipment accessibility as equipment which included a list of 18 various input, control, mechanical, output, display, and control functions. 36 CFR 1193.41, 43. The Commission proposes to adopt these 18 functions as part of its definition of the statutory term "accessible to and usable by." *NPRM*, para. 74-75. PCC is concerned that this definition, if adopted as proposed, could be construed as requiring each product to incorporate all 18 functions. If the regulatory requirement is construed as requiring each product to incorporate all 18 functions, a consumer requiring any one of the 18 functions in order to use the product could, when finding a product lacking that one needed function, consider himself or herself entitled to seek a complaint under Section 255 -- even if other products which provided the required function were available. With the term "accessible to and usable by" defined in terms of all 18 functions, a manufacturer could be expected to attempt the practically impossible -- and then expend resources to document that it could not achieve the impossible. PCC recommends that the Commission adopt a definition of this term that is consistent with its recognition that:

... the ideal of full accessibility is generally limited by feasibility, expense, or practicality (individually or in combination), especially in the case of CPE offerings, where direct physical interaction between user and equipment is often extensive. In the marketplace, providers must decide what features to include and what features to omit.

NPRM, para. 170. A definition of the term “accessible to and usable by” that reflects the practical reality that universal accessibility and usability in a single product is impossible would have the further salutary effect of avoiding unrealistic expectations.

The Commission should not adopt its proposed “fast track” process for adjudicating complaints under Section 255 and adopt, instead, a process that provides adequate time to resolve access problems.

The Commission proposes a “fast track” process in which complainants would be “encouraged,” but not required, to first contact the manufacturer to attempt an informal resolution of the complaint; the Commission promptly would forward the complaint to the manufacturer whose offering was the subject of the complaint; the manufacturer would then have 5 business days to “. . .study the complaint, . . .identify possible accessibility solutions, and, most importantly, work with the complainant to solve the access problem if possible,” and provide a written response to the complaint. In circumstances where “substantial efforts are underway,” the manufacturer would be permitted to provide an informal progress report and “request” additional time to continue the problem-solving efforts. *NPRM*, paras. 128 &135-137.

The five-day period for responding to a complaint is far too short to permit a meaningful exchange of information about the barrier to accessibility that presents a problem to the consumer, investigate possible solutions to the problem, discuss those possible solutions with the consumer, agree on a solution, and document the resolution for reporting to the Commission. Although some complaints may be resolved easily with one phone call, others will require significant time and resources to investigate adequately. If nothing else, it is not a trivial possibility that, at any given time, people with information or

expertise necessary to resolve a complaint will be unavailable due to business travel, vacations, or illness, or that the complainant may not be available to provide the information needed for the manufacturer to evaluate the access requirement. Moreover, given that many manufacturers have facilities with potentially necessary information and expertise located outside of the United States, a good portion of the allowed five-day period could be consumed simply by the complexities of communicating with people on the other side of the world -- and, more significantly, on the "other side of the clock."

PCC believes that the Commission should encourage the prompt, informal resolution of complaints about the accessibility or usability of a product by individuals with disabilities and that it would be most productive for all parties if each complaint or inquiry resulted in an exchange of information about an unmet need for the removal of a barrier to accessibility of a product. PCC believes that, in many cases, an initial complaint is, in reality, an inquiry from a consumer about how to obtain a product that meets the consumer's very specific, individual need, and expects that many such inquiries can be resolved expeditiously by providing the consumer information about products that may meet the consumer's needs. The Commission's "fast track" complaint process would turn many of these inquiries into complaints, unnecessarily involve the Commission in the process, and cause manufacturers to expend their resources in providing written reports and requests for extensions of time to the Commission.

PCC proposes that, instead of its "fast track" process, the Commission adopt a process for adjudicating complaints in which the Commission initially refers all Section 255 complaints to the manufacturer, provided that the manufacturer has established a

point of contact for inquiries about the accessibility of its products and has provided that contact information to the Commission. This would permit the manufacturer and the consumer to engage in a mutual problem-solving discussion unburdened by what would, in virtually all events, be an impossible five day deadline. Under PCC's proposal, the Commission would not initiate its own complaint process unless the consumer and manufacturer had been unable to reach a satisfactory solution to the access problem within a period of sixty days. Obviously, if the consumer believes that progress is being made toward resolving the problem, the consumer could elect not to proceed any further toward filing a Section 255 complaint with the Commission. If the consumer's problem remains unresolved after sixty days, the consumer would be permitted to file a Section 255 complaint with the Commission using, first, the Commission's existing informal complaint process and proceeding, if circumstances warrant, to a formal complaint.

The Commission should establish a reasonable standing requirement for complaints under Section 255.

The Commission proposes not to impose a standing requirement for complaints under Section 255 "whether by virtue of being a person with a disability, being a customer of the entity that is the subject of the complaint, or otherwise." The Commission explains that the absence of a standing requirement serves the purposes of the statute by "not restricting complaints about accessibility problems" and avoids "burdening the complaint process with disputes relating to standing" *NPRM*, para. 148. PCC disagrees with the premise that a reasonable standing requirement would place an inappropriate burden on the complaint process. Rather, PCC believes that the absence of a standing requirement

will impede the orderly resolution of Section 255 complaints and, therefore, urges the Commission to impose a reasonable standing requirement.

It is difficult to imagine a valid complaint about the accessibility or usability of a product that does not relate to the circumstances of a specific individual with a specific type and degree of disability seeking to use a specific product and facing a specific barrier to accessibility. The demonstrations at the Commission's April 2, 1998 Open Meeting, at which the *NPRM* in this docket was adopted, clearly illustrate that accessibility and usability involve highly individualized accessibility evaluations. None of the products demonstrated was totally accessible -- in that not one of the products would have met the needs of all of the demonstrators. Likewise, not one of the products was totally inaccessible -- in that none of them failed to meet the needs of at least one of the demonstrators. Transcript (unpaginated), pages 1-5. A reasonable standing requirement will ensure that Section 255 complaints are the result of the inability of an individual with a disability to obtain an accessible or usable product.

Thus, PCC proposes that the Commission require that any complaints lodged under Section 255 be filed by, or on behalf of, an individual with a disability, show that the complaint could not be resolved on an informal basis directly with the manufacturer within a 60 day period, and state with particularity the barrier to accessibility associated with the equipment that is the subject of the complaint. This minimum standing requirement would not prevent organizations representing the legitimate interests of the disability community from assisting an individual to file a complaint -- or even filing the complaint on behalf of an individual. On the other hand, this modest standing requirement would discourage Section 255 complaints from being filed by persons with only a pecuniary interest in a

dispute with a manufacturer or by persons who might be tempted to file a complaint as a means of obtaining information about a manufacturer's cost structure or design and development process that would ordinarily not be publicly available. The Commission's Section 255 complaint process simply should not be available to be used for such irrelevant, abusive, and anti-competitive purposes.

The Commission should fully protect the confidentiality of confidential or proprietary information provided by a manufacturer in response to a complaint.

One of the defenses available to a manufacturer in responding to a complaint that a product was not accessible to or usable by an individual with a disability is a demonstration that it was not readily achievable to provide the accessibility features desired by the complainant. In making such a demonstration, a manufacturer will, in many instances, have no choice but to provide proprietary and confidential information related to the manufacturer's design, development, and fabrication processes, the cost and expenses related to the product in question, future product introduction plans, and other highly proprietary aspects of its product design activities. PCC goes to great lengths to protect its proprietary and confidential information from disclosure to its competitors, suppliers, and dealers because disclosure could place PCC at a significant disadvantage with respect to outside parties with whom it competes or has contractual commercial relationships. The adverse consequences of disclosing a manufacturer's proprietary and confidential information come about whether the disclosure is intentional or inadvertent.

In order to adequately protect manufacturers' proprietary and confidential business information from disclosure, the Commission should adopt procedural rules that provide

the manufacturer with a presumption that any material submitted in response to a Section 255 complaint that the manufacturer identifies as "business confidential" information will be treated as such by the Commission. In addition, the Commission should permit disclosure of a manufacturer's business confidential information to a complainant or the complainant's representative only after executing a non-disclosure agreement. Moreover, a manufacturer's business confidential information that is disclosed pursuant to a non-disclosure agreement should be available for inspection at the offices of the Commission with a Commission employee in attendance. In no case should the Commission permit a complainant or representative to make copies of a manufacturer's business confidential information. If a complainant violates a non-disclosure agreement or the Commission's rules for the protection of a manufacturer's business confidential information by disclosing such information, or if a complainant refuses to sign a non-disclosure agreement, the Commission should dismiss the complaint. Finally, the Commission, in its Order adopting rules for the processing of Section 255 complaints, should make it very clear that, in addition to dismissal of a complaint, substantial sanctions will be imposed on any individual or organization which violates either a non-disclosure agreement or the Commission's rules for the protection of manufacturers' confidential business information.

Conclusion

For the reasons stated above, the Commission should dismiss Section 255 complaints upon a manufacturer's demonstration that one of the manufacturer's products provided the desired accessibility features, the lack of which prompted the complaint. In considering whether an action to enhance accessibility is readily achievable, the

Commission should consider feasibility, expense, potential delays in introducing new products into the marketplace, and whether the action would involve an alteration of an essential or fundamental characteristic of the product. The Commission should not extend the obligations of Section 255 to providers of information services and manufacturers of related equipment because such an extension would be inconsistent with the plain language of Section 255 which limits such obligations to providers of telecommunications services and manufacturers of telecommunications equipment and CPE. The five day response period contemplated by the Commission's "fast track" complaint process is far too short to provide a meaningful opportunity to resolve complaints about the accessibility of products. Rather than implement its proposed fast track process, the Commission should refer consumers with a complaint about the accessibility of a product to the manufacturer and provide a period of sixty days for the manufacturer to resolve the consumer's accessibility issue. A reasonable standing requirement for Section 255 complaints -- that the complaint be filed by or on behalf of an individual with a disability -- would facilitate the orderly resolution of Section 255 complaints; therefore, such a

standing requirement should be adopted by the Commission. And, finally, the Commission should adopt measures to fully protect a manufacturer's confidential business information that is submitted in response to a Section 255 complaint.

Respectfully Submitted,

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